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CHARLES ELMORE CROPLEY
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 667

JACOB F. HOLMES, ET AL.,

Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and MACON, DUBLIN & SAVANNAH RAILROAD COMPANY

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

STATEMENT AS TO JURISDICTION

DAVID M. PULLER,
Counsel for Appellants.

SHEARMAN, ROBERTSON, PULLER & LOUGEE,
Of Counsel.

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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JACOB F. HOLMES, JAMES D. BELL, JEANNETTE P. BELL, CHARLES E. PORTEOUS, MARGARET F. SCHMUCKER, AMELIA A. MEURY, JANE S. MATHEWSON AND G. FREDERIC HELBIG,

Plaintiffs,

against

UNITED STATES OF AMERICA AND MACON, DUBLIN & SAVANNAH RAILROAD COMPANY,

Defendants,

INTERSTATE COMMERCE COMMISSION,

Intervening Defendant

JURISDICTIONAL STATEMENT

In compliance with Rule 12 of the Revised Rules of the Supreme Court of the United States, the appellants submit herewith their statement showing the basis of the jurisdiction of the Supreme Court of the United States to entertain the appeal in this cause:

1. Jurisdiction of the Supreme Court of the United States to review by direct appeal the judgment entered herein is conferred by Title 28, United States Code, Section 1253.

2. The statute of the United States, the validity of which is herein challenged on the ground that it is unconstitutional, is Section 20b of the Interstate Commerce Act, Title 49, United States Code, Section 20b, 62 Stat. 163, which in part provides as follows:

> "Section 20b. Modification of railroad financial structures-Approval and authorization of Commission; exclusion of equipment-trust securities
>
> (1) It shall be lawful (any express provision contained in any mortgage, indenture, deed of trust, corporate charter, stock certificate, or other instrument or any provision of State law to the contrary notwithstanding), with the approval and authorization of the Commission, as provided in paragraph (2) of this section, for a carrier as defined in section 20a (1) of this title to alter or modify (a) any provision of any class or classes of its securities as defined in section 20a (2) of this title being hereinafter in this section sometimes called 'securities'; or (b) any provision of any mortgage, indenture, deed of trust, corporate charter, or other instrument pursuant to which any class of its securities shall have been issued or by which any class of its obligations is secured (hereinafter referred to as instruments);
>
> • • • • • • •
>
> Application; public hearing; findings; submission of plan to security holders; order of Commission; force and effect
>
> (2) Whenever an alteration or modification is proposed under paragraph (1) of this section, the carrier seeking authority therefor shall, pursuant to such rules and regulations as the Commission shall prescribe, present an application to the Commission. • • • If the Commission, after hearing, in addition to making (in any case where such alteration or modification involves an issuance of securities) the findings required by paragraph (2) of section 20a of this title, not inconsistant with paragraph (1) of this section shall find

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that, subject to such terms and conditions and with such amendments as it shall determine to be just and reasonable, the proposed alteration or modification—

(a) is within the scope of paragraph (1) of this section;

(b) will be in the public interest;

(c) will be in the best interests of the carrier, of each class of its stockholders, and of the holders of each class of its obligations affected by such modification or alteration; and

(d) will not be adverse to the interests of any creditor of the carrier not affected by such modification or alteration, then (unless the applicant, carrier shall withdraw its application) the Commission shall cause the carrier, in such manner as it shall direct, to submit the proposed alteration or modification (with such terms, conditions, and amendments, if any) to the holders of each class of its securities affected thereby, for acceptance or rejection. * * * If the Commission shall find that as a result of such submission the proposed alteration or modification has been assented to by the holders of at least 75 per centum of the aggregate principal amount or number of shares outstanding of each class of securities affected thereby (or in any case where 75 per centum thereof is held by fewer than twenty-five holders, such larger percentage, if any, as the Commission may determine to be just and reasonable and in the public interest), the Commission shall enter an order approving and authorizing the proposed alteration or modification upon the terms and conditions and with the amendments, if any, so determined to be just and reasonable. * * * Any alteration or modification which shall become and be binding pursuant to the approval and authority of the Commission hereunder shall be binding upon each holder of any security of the carrier of each class affected by such alteration or modification, * * * and when any alteration or modification shall become and be

binding the rights of each such holder and of any such trustee or other party shall be correspondingly altered or modified."

3. The judgment of the District Court sought to be revised was entered on the 16th day of January, 1950 and the application for appeal was filed on the 27th day of January, 1950 and is presented to the District Court herewith, to wit, on the 27th day of January, 1950.

4. This suit was brought to vacate, set aside, suspend and annul an order of the Interstate Commerce Commission dated March 10, 1949 and to restrain and enjoin, perpetually, the enforcement thereof on the ground that Section 20b of the Interstate Commerce Act pursuant to provisions of which the order was made, contravenes the Constitution of the United States. On January 3, 1904, Macon, Dublin & Savannah Railroad Company authorized the issuance of $1,840,000 principal amount of First Mortgage Forty Year Five Percent Bonds. The bonds, by their terms, became due and payable on January 1, 1947. Of the $1,840,000 principal amount of bonds authorized, $1,733,000 principal amount were issued and $107,000 principal amount of bonds were never issued. When the order of March 10, 1949 was made, $1,529,000 principal amount of bonds were outstanding and $204,000 principal amount of bonds were held in Macon, Dublin & Savannah Railroad Company's treasury. In April, 1948, the Interstate Commerce Act was amended by the addition thereto of Section 20b and on June 15, 1948, Macon, Dublin & Savannah Railroad Company made application for relief under that section. The plan which was submitted in the application provided for the extension of the maturity date from January 1, 1947 to January 1, 1972 and for leave to reissue the $204,000 principal amount of bonds held in the treasury and to issue the $107,000 principal amount of bonds which had never been issued. On

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December 9, 1948, the Interstate Commerce Commission rendered a report on the plan and thereafter entered an order approving it in the form submitted. In that order the Commission authorized Macon, Dublin & Savannah Railroad Company to solicit consents to the plan. This Macon did, and having procured approval of the plan by holders of upwards of 75% of the outstanding bonds, the Commission made the order and report dated March 10, 1949. Application for the reconsideration of the report and order dated December 9, 1949 and the application for reconsideration was denied by the Commission.

5. The defendant, United States of America and the intervenor, Interstate Commerce Commission, moved to dismiss the complaint herein on the ground that the Court did not have jurisdiction because the plaintiffs had not made application for a rehearing or a reconsideration of the order of March 10, 1949 as, it was alleged, is required by Section 17(9) of the Interstate Commerce Act, as amended (49 United States Code 17(9)). The Court after trial rendered a decision holding that it lacked jurisdiction and directed a dismissal of the complaint therein. The District Court rendered an opinion, a copy of which is hereto annexed.

6. *United States* v. *Idaho*, 298 U. S. 105, sustains the jurisdiction of the Supreme Court of the United States to entertain this appeal.

Respectfully submitted,

SIEGELBAUM, ROSENZWEIG,
PALLEY & BERGER,
By (S.) DAVID M. PALLEY,
A Member of Said Firm,
Attorneys for Plaintiffs,
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APPENDIX "A"

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil 50-320

JACOB F. HOLMES, ET AL., *Plaintiffs*,

vs.

UNITED STATES OF AMERICA, ET AL., *Defendants*

Action by certain bondholders of Macon, Dublin & Savannah Railroad Company to set aside an order made by Division 4 of the Interstate Commerce Commission in a proceeding brought under section 20(b) of the Interstate Commerce Act, 49 U. S. C. Section 20(b). Complaint dismissed for lack of jurisdiction.

David M. Palley, and Siegelbaum, Rosenzweig, Palley & Berger, all of New York City, for plaintiffs.

William D. McFarlane, Special Assistant to the Attorney General and Gerald L. Phelps, Special Attorney, Department of Justice; Herbert A. Bergson, Assistant Attorney General, James E. Kilday, Special Assistant to the Attorney General, John F. X. McGohey, United States Attorney, for defendant United States of America.

Harold J. Gallagher, and Willkie Owen Farr Gallagher & Walton, all of New York City, for defendant Macon, Dublin & Savannah Railroad Co.

Daniel W. Knowlton, Chief Counsel, for intervenor-defendant Interstate Commerce Commission.

By leave of Court, a brief *amici curiae* was filed by Fred N. Oliver, Willard P. Scott, Chauncey H. Hand, Jr., and G. Clark Cummings, all of New York City, for Railroad Securities Owners Association, Inc., R. J. Fletcher, of Boston, Mass. for Boston & Maine Railroad, and E. Spencer Miller, of Portland, Maine, for Maine Central Railroad Co.

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Before Swan Circuit Judge, and Ryan and Samuel H. Kaufman, District Judges

SWAN, Circuit Judge:

This is a suit by eight holders of First Mortgage Forty Year 5% Bonds of Macon, Dublin & Savannah Railroad Company to set aside an order made on March 10, 1949 by Division 4 of the Interstate Commerce Commission authorizing an extension of the maturity date, and certain other modifications, of said bonds. The complaint was filed May 24, 1949. The suit is brought under 28 U. S. C. Sections 1336, 2321-2325 and 49 U. S. C. Section 17(9). A three judge court was convened pursuant to 28 U. S. C. Section 2284. The Interstate Commerce Commission has intervened as a party defendant pursuant to 28 U. S. C. Section 2323. After answers were filed, the case was brought on for final hearing on October 10, 1949. With the court's consent briefs were to be submitted later and they have been received.

The order under attack was entered in a proceeding initiated on June 15, 1948 by the Railroad Company under section 20(b) of the Interstate Commerce Act, 49 U. S. C. Section 20(b), to obtain modifications of its First Mortgage bond issue which had matured January 1, 1947, the principal modification proposed being an extension of the maturity date to 1972. After hearings, Division 4 of the Commission issued its report and order of December 9, 1948, 271 I. C. C. 376. This directed that the proposed modifications be submitted to the bondholders for acceptance or rejection. It detailed the procedure to be followed on submission and directed: that the applicant Railroad file with the Commission a certificate as to acceptances; that upon request the applicant make available to the parties to the proceeding a list of the names and addresses of bondholders; and that all letters, circulars, etc., to be sent to bondholders be submitted to the Commission for approval. One of the plaintiffs, G. Frederick Helbig, petitioned for reconsideration of the order of December 9. His petition was denied by the full Commission on January 13, 1949.

Thereafter, on March 10, 1949, Division 4 made another report and order, 271 I. C. C. 498. The report found that

the plan of modification had been approved by holders of not less than 75% of the class of securities affected, in accordance with Section 20(b). The order approved and authorized the proposed modification and directed that it become effective at 12:01 A. M. on the day following the applicant's publication of a declaration to that effect. Such a declaration was thereafter published. None of the plaintiffs applied to the Commission for reconsideration of the order of March 10.

The plaintiffs contend that the order of March 10 is null and void on the ground that section 20(b) of the Interstate Commerce Act is unconstitutional because it (1) contravenes the due process clause of the Fifth Amendment; (2) is a delegation to the Commission of legislative power in contravention of Article I, section 1 of the Constitution; (3) is a delegation of judicial power in contravention of Article III, section 1; and (4) is an exercise of a power not delegated to the United States in contravention of the Tenth Amendment. Before these questions can be reached, we must consider the defense set up in the answers of the United States and the Commission, namely, that the Court lacks jurisdiction because the plaintiffs have failed to exhaust their administrative remedy in accordance with section 17(9) of the Interstate Commerce Act, 49 U. S. C. Section 17(9). The section requires that rehearing, reargument or reconsideration by the full Commission be sought prior to judicial review of an order by a Division of the Commission.[1]

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[1] Section17(9): "When an application for rehearing, reargument or reconsideration of any decision, order or requirement of a division * * * shall have been made and shall have been denied, or after rehearing, reargument or reconsideration otherwise disposed of by the Commission, * * * a suit to enforce, enjoin, suspend, or set aside such decision * * * may be brought in a court of the United States under those provisions of law applicable in the case of suits to enforce, enjoin, suspend, or set aside orders of the Commission, *but not otherwise.*" (Italics supplied.)

The Conference Report states (H. Rep. 2832, 76th Cong. 3rd sess. p. 72): "A new paragraph (9) is included providing that orders of a Division, an individual Commissioner or a Board, shall be subject to judicial review as in the case of full Commission orders, *after an application for rehearing has been made and acted upon.*" (Italics supplied.)

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The plaintiffs argue that their administrative remedy was in fact exhausted when the full Commission denied Helbig's petition for reconsideration of Division 4's order of December 9. They rely on Rule 101(f) of the Commission,[2] which, they say, precluded them from seeking reconsideration of the order of March 10. We do not agree. The rule merely forbids successive petitions for reconsideration on the same grounds with respect to the same order. So the Commission interprets the Rule and we accept its interpretation. The two orders were not the same. The December order merely authorized the Railroad to submit the proposed modification to its bondholders for acceptance or rejection by them. Denial of reconsideration of that order left the plaintiffs free to ask reconsideration of the order of March 10, which did authorize the proposed modification.

If Rule 101(f) were to be construed as the plaintiff contends, it would run counter to Section 17(9) and would therefore be invalid. That section lays down conditions precedent to judicial review of the order of March 10. The Commission could not by its Rules extend this court's jurisdiction beyond the Congressional grant. The United States is a necessary party to a suit to set aside an order of the Commission. 28 U. S. C. Section 2322. And the United States is immune from suit except upon terms laid down by Congress on which it consents to be sued. United States v. Sherwood, 312 U. S. 584, 586. Since Congress has in explicit terms required a petition for reconsideration to be filed before review in the courts is sought, this court lacks jurisdiction to entertain the present suit.

Plaintiffs further argue that a petition for reconsideration of the March 10 order was unnecessary because the only ground on which it is attacked is the constitutional one, and the Commission has announced that it cannot pass on the constitutionality of legislation which it is required to ad-

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[2] "(f) *Successive petitions on same grounds, not entertained.*—A successive petition under subdivision (d) of this rule filed by the same party or parties, and upon substantially the same grounds as a former petition, which has been considered and denied by the entire Commission, or by an appropriate appellate division, will not be entertained."

minister. Lehigh Valley R. R. Co., 271 I. C. C. 553, 589. We may assume without decision that such is the case. But we cannot assume that upon petition for reconsideration the Commission would not have reversed the order of March 10, thereby eliminating the constitutional question here presented. A recent decision of the Supreme Court warns us not to seek out constitutional questions which may be avoided by the orderly termination of the administrative process. Aircraft & Diesel Corp. v. Hirsch, 331 U. S. 752, 772.[3] It is true that in the same case the court said that where a constitutional question is coupled with a sufficient showing of inadequacy of the prescribed administrative relief and of irreparable injury flowing from delay incident to following the prescribed procedure, the administrative process may be dispensed with, although "this rule is not one of mere convenience or ready application." Id. at 773. Here, however, the plaintiffs do not attempt to assert that they would have been irreparably injured had they applied for reconsideratiion. Without assertion and proof of irreparable injury, they cannot bring themselves within this narrow exception to the well-established rule that administrative remedies must be exhausted before judicial review becomes available. Macauley v. Waterman S. S. Co., 327 U. S. 540; Myers v. Bethlehem Shipbuilding Corp., 303 U. S. 41. The general rule would be sufficient to decide this case. The explicit command of Section 17(9) makes the result inevitable. Congress must have been aware that the constitutionality of various provisions of the Interstate Commerce Act would be challenged in suits to set aside orders of the Commission. The fact that the substantive issue here presented is constitutional cannot remove the barrier to this suit interposed by Section 17(9). The complaint is dismissed for want of jurisdiction.

If the parties desire formal findings of fact pursuant to Rule 52a, Federal Rules of Civil Procedure, 28 U. S. C. A.

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[3] "• • • the very fact that constitutional issues are put forward constitutes a strong reason for not allowing this suit either to anticipate or to take the place of the Tax Court's final performance of its function. • • • The Tax Court may decide entirely in appellants' favor."

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foll. Section 723, they may submit proposed findings within ten days.

(S.) THOMAS W. SWAN,
Circuit Judge;

(S.) SYLVESTER J. RYAN,
District Judge;

(S.) SAMUEL H. KAUFMAN,
District Judge.

November 25, 1949.

APPENDIX "B"

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Civil No. 50-320

JACOB F. HOLMES, ET AL., *Plaintiffs,*

vs.

UNITED STATES OF AMERICA, ET AL., *Defendants*

The above-styled cause having come on to be heard on October 10, 1949 before a specially constituted three-judge United States District Court, and the Court's opinion having been filed herein, the Court now makes the following findings of fact and conclusions of law:

1. The defendant Macon, Dublin & Savannah Railroad Company is a corporation duly organized under the laws of the State of Georgia and is, and at all times hereinafter mentioned was, a carrier by railroad.

2. The plaintiffs Jacob F. Holmes, James D. Bell, Jeannette P. Bell, Charles E. Porteous, Margaret F. Schmucker, and G. Frederic Helbig are all residents of the Southern District of New York within the jurisdiction of this Court and Amelia A. Meury and Jane S. Mathewson are residents of the Northern District of New York.

3. On January 3, 1907, the Macon, Dublin & Savannah Railroad Company, a defendant herein, issued its First Mortgage Forty Year Five Percent Bonds in the authorized amount of $1,840,000 to mature on January 1, 1947, of which $1,733,000 were purchased by the general public.

4. The plaintiffs severally owned some of these bonds, the individual face amounts totalling $25,000.00.

5. On June 15, 1948, the defendant Macon, Dublin & Savannah Railroad Company filed an application with the Interstate Commerce Commission for authority under Section 20b of the Interstate Commerce Act to place in effect a plan which would extend the maturity date of its Forty Year Five Percent Bonds from January 1, 1947 to January 1, 1972, and would amend these bonds and the mortgage in certain other respects.

6. After hearings, and on December 9, 1948 Division 4 of the Interstate Commerce Commission issued a report and order approving the authority sought by the Macon, Dublin & Savannah Railroad Company, subject to the prior performance of certain conditions, including the securing of approval of the proposed plan by bondholders representing at least 75 percent of the face amount of the bonds.

7. On or about January 7, 1949, the plaintiff G. Frederic Helbig filed with the Commission a petition for reconsideration of the report and order issued by Division 4 of the Commission on December 9, 1948, and on January 13, 1949, after having stayed the effective date of that order issued by Division 4, the Commission denied the petition for reconsideration.

8. Thereafter, and on February 18, 1949, the defendant Macon, Dublin & Savannah Railroad Company filed with the Commission a sworn certificate of the Mercantile Trust Company of Baltimore, Maryland, depository under the proposed plan, setting forth, among other things, that the holders of 86.08 percent of the Forty Year Five Percent Bonds had assented to the proposed plan to modify the maturity date and to make other changes in the bonds and the mortgage.

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9. On March 10, 1949, Division 4 of the Interstate Commerce Commission issued its report and order, finding that as a result of the submission of the proposed plan to the bondholders, assents representing not less than 75 percent of the aggregate principal amount of the bonds affected had been given to the plan, in accordance with Section 20b of the Interstate Commerce Act. By this report and order Division 4 approved and authorized the Macon, Dublin & Savannah Railroad Company to place the proposed plan of alteration or modification into effect upon the terms and conditions theretofore found by Division 4 to be just and reasonable.

10. None of the plaintiffs applied to the Interstate Commerce Commission for reconsideration of the report and order of March 10, 1949 issued by Division 4 of the Interstate Commerce Commission.

11. On May 24, 1949, the plaintiffs filed with this Court the complaint in this cause, in which the plaintiffs sought an order or decree vacating, annulling, setting aside and enjoining the order issued by Division 4 of the Interstate Commerce Commission on March 10, 1949 on the grounds that said order contravened various provisions of the Constitution of the United States.

Conclusions of Law

1. The United States is immune from suit except upon terms laid down by Congress on which it consents to be sued.

2. Section 17(9) of the Interstate Commerce Act, 49 U. S. C. Section 17(9), contains a condition precedent to suit on an order issued by a division of the Interstate Commerce Commission and requires that rehearing, reargument or reconsideration by the full Commission be sought prior to judicial review of such an order.

3. This administrative remedy was required to be sought as to the order of March 10, 1949 on which suit has been brought, notwithstanding that rehearing, reargument or

reconsideration was sought as to the prior order of December 9, 1948.

4. The complaint is dismissed for want of jurisdiction.

(S.) THOMAS W. SWAN,
C. J.;

(S.) SYLVESTER J. RYAN,
D. J.;

(S.) SAMUEL H. KAUFMAN,
D. J.

(7077)

In the United States District Court for the Southern District of New York

CIVIL ACTION NO. 50-320

JACOB F. HOLMES, JAMES D. BELL, JEANNETTE P. BELL, CHARLES E. PORTEOUS, MARGARET F. SCHMUCKER, AMELIA A. MEURY, JANE S. MATHEWSON, AND G. FREDERIC HELBIG, PLAINTIFFS-APPELLANTS

v.

UNITED STATES OF AMERICA, MACON, DUBLIN & SAVANNAH RAILROAD COMPANY, AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS-APPELLEES

MOTION TO AFFIRM

Appellees, United States and Interstate Commerce Commission, pursuant to Rule 12, paragraph 3, of the Revised Rules of the Supreme Court of the United States, move that the final judgment and decree of the District Court be affirmed.

This is a direct appeal from the final judgment and decree entered on January 16, 1950, by a district court of three judges specially constituted pursuant to 28 U. S. C. §§ 2284 and 2325, dismissing appellants' complaint which sought to set aside an order made by Division 4 of the Inter-

state Commerce Commission. Appeal was allowed on January 27, 1950, and appeal papers were served on the United States Attorney for the Southern District of New York on February 8, 1950, and on the Interstate Commerce Commission on February 7, 1950.

On June 15, 1948, the Macon, Dublin & Savannah Railroad Company applied to the Interstate Commerce Commission under Section 20b of the Interstate Commerce Act (62 Stat. 163; 49 U. S. C. 20b) for authority to extend the muturity date and otherwise to modify its First Mortgage Forty Year Five Percent Bonds and the related mortgage. Following hearings, Division 4 of the Commission on December 9, 1948, issued a report and order in which it made the necessary findings and concluded that the plan was in accord with the statutory standards prescribed in Section 20b, subject to the required assent of 75 percent of the affected bondholders. The order provided for submission of the proposal to the bondholders subject to the further determination of the Commission.[1]

Application for reconsideration of this order was filed by one of the appellants, but was denied by the entire Commission. Thereafter, the Macon, Dublin & Savannah Railroad Company submitted to the Commission proof that more than 75 percent of the affected bondholders had approved the

[1] *Macon, Dublin & Savannah Railroad Company Bond Modification*, 271 I. C. C. 376.

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proposal. On March 10, 1949, Division 4 of the Commission issued its report and order, finding that the plan conformed to Section 20b and authorizing its effectuation.[2]

Appellants brought this action in the United States District Court for the Southern District of New York, seeking to have the order of March 10, 1949, set aside on the ground that Section 20b of the Interstate Commerce Act contravened the Fifth and Tenth Amendments, and Articles I and III of the Constitution. The District Court dismissed the complaint on the ground that the court lacked jurisdiction to hear the issues raised because of appellees' failure to exhaust their administrative remedies under the Interstate Commerce Act.

The decision of the District Court is plainly correct. Section 17 (9) of the Interstate Commerce Act (49 U. S. C. 17 (9)) specifically limits suits to set aside a decision of the Interstate Commerce Commission to review of final action of the Commission as a whole, and requires the litigant to exhaust his administrative appeals from decisions of subordinate divisions within the Commission as a prerequisite. This section provides:

> When an application for rehearing, reargument, or reconsideration of any decision, order, or requirement of a division, an individual Commissioner, or a board

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[2] *Macon, Dublin & Savannah Railroad Company Bond Modification*, 271 I. C. C. 498.

> with respect to any matter assigned or referred to him or it shall have been made and shall have been denied, or after rehearing, reargument, or reconsideration otherwise disposed of, by the Commission . . . a suit to enforce, enjoin, suspend, or set aside such decision, order, or requirement, in whole or in part, may be brought in a court of the United States under those provisions of law applicable in the case of suits to enforce, enjoin, suspend, or set aside orders of the Commission, *but not otherwise*. [Emphasis added.]

Section 17 (6) provides procedure for appeal to the entire Commission from a division order, and Section 17 (7) authorizes the entire Commission to reverse, modify or change a division order when such action appears to be appropriate. Section 17 (8) requires the Commission to stay the effectiveness of any outstanding order pending disposition of a petition for reconsideration.

Thus, the statute provides that judicial review is confined to those orders having the requisite finality of action by the full Commission.[3] Since

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[3] In the conference report on the bill that became the Transportation Act of 1940, which added § 17 (9) to the Act, the Managers on the part of the House said (H. Rep. 2832, 76th Cong., 3d sess., p. 72):

A new paragraph (9) is included providing that orders of a Division, an individual Commissioner, or a Board shall be subject to judicial review as in the case of full Commission orders, *after* an application for rehearing has been made and acted upon. [Emphasis added.]

We have been able to discover five instances, in addition to

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appellants did not petition for reconsideration by the full Commission of the order of March 10, 1949, they have failed to establish the statutory basis for judicial review.[4]

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the one at bar, where the judicial process was resorted to without compliance with the terms of § 17 (9). In two cases, the three-judge district courts held the provision to be jurisdictional and dismissed the complaints for failure of the plaintiffs to exhaust that administrative remedy. *Idaho* v. *United States*, not reported (In Equity No. 439, D. C. Utah, April 17, 1943); *C. W. Hendley & Co., Inc.* v. *United States*, not reported (Civil Action No. 581–47), D. C. Dist. Col., February 25, 1947). In two cases district courts have stated that Section 17 (9) did not require an application for reconsideration to the full Commission, but then have proceeeded to dismiss the complaints on other grounds. *Western Express Co., Inc.* v. *United States*, not reported (Civil Action No. 3317, D. C. N. D. N. Y., July 21, 1949); *J. B. Braswell* v. *United States*, not reported (Civil Action No. 1059, D. C. W. D. Texas, El Paso Div., December 22, 1949). In the *Western Express* case, Circuit Judge Chase, in a concurring opinion, stated that § 17 (9) imposed "an express limitation upon our jurisdiction" to review an order of a division of the Commission. In *Texas* v. *United States*, not reported (Civil Action No. 4004, D. C. W. D. Okla., January 26, 1949), affirmed, 337 U. S. 911, the applicability of § 17 (9) was raised by the United States in the lower court. However, the complaint was dismissed on other grounds, the court not referring to § 17 (9). In its motion to affirm the United States again raised the point, but this Court did not indicate its grounds for affirmance.

[4] The fact that one appellant had petitioned for reconsideration of the earlier interlocutory order of December 9, 1948, did not fulfill this statutory requirement. The order of December 9, 1948, is not the one here sought to be enjoined. No petition for reconsideration was made as to the order of March 10, 1949.

Appellants' assertions that the order should be set aside on the ground that Section 20b is unconstitutional affords them no greater right. As the District Court stated "We cannot assume that upon petition for reconsideration the Commission would not have reversed the order of March 10, thereby eliminating the constitutional question here presented . . . Congress must have been aware that the constitutionality of various provisions of the Interstate Commerce Act would be challenged in suits to set aside orders of the Commission. The fact that the substantive issue here presented is constitutional cannot remove the barrier to this suit interposed by Section 17 (9)."

As the District Court points out, the Supreme Court in *Aircraft & Diesel Equipment Corp.* v. *Hirsch,* 331 U. S. 752, ruled that constitutional questions will not be considered when they might have been, but were not, raised in the course of orderly administrative process, particularly where, as here, there is no showing either of inadequate opportunity for administrative relief or of irreparable injury.

United States v. *Idaho,* 298 U. S. 105, cited in the jurisdictional statement, is not controlling. That case was decided prior to the enactment of Section 17 (9), and at that time the Interstate Commerce Act did not require application for reconsideration of a division order by the entire Commission as a prerequisite of judicial review.

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Cf. *United States* v. *Abilene R. R. Co.*, 265 U. S. 274.

We respectfully submit, therefore, that the appellants present no substantial question for the decision of this Court, and that the judgment and decree of the District Court should be affirmed.

PHILIP B. PERLMAN,
Solicitor General.

DANIEL W. KNOWLTON,
Chief Counsel, Interstate Commerce Commisison.

FEBRUARY 1950.

U. S. GOVERNMENT PRINTING OFFICE: 1950

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CHARLES ELMORE CR

Supreme Court of the United States

October Term, 1949.

No. 657.

JACOB F. HOLMES, JAMES D. BELL, JEANNETTE P. BELL, CHARLES E. PORTEOUS, MARGARET F. SCHMUCKER, AMELIA A. MEURY, JANE S. MATHEWSON and G. FREDERIC HELBIG,

Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and MACON, DUBLIN & SAVANNAH RAILROAD COMPANY.

Petition of Jacob F. Holmes, James D. Bell, Jeannette P. Bell, Charles E. Porteous, Margaret F. Schmucker, Amelia A. Meury, Jane S. Mathewson and G. Frederic Helbig for a Rehearing.

DAVID M. PALLEY,
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Supreme Court of the United States

OCTOBER TERM, 1949.

No. 657.

JACOB F. HOLMES, JAMES D. BELL, JEANNETTE P. BELL, CHARLES E. PORTEOUS, MARGARET F. SCHMUCKER, AMELIA A. MEURY, JANE S. MATHEWSON and G. FREDERIC HELBIG,

Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and MACON, DUBLIN & SAVANNAH RAILROAD COMPANY.

Petition of Jacob F. Holmes, James D. Bell, Jeannette P. Bell, Charles E. Porteous, Margaret F. Schmucker, Amelia A. Meury, Jane S. Mathewson and G. Frederic Helbig for a Rehearing.

To the Honorable Fred M. Vinson, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The appellants, Jacob F. Holmes, James D. Bell, Jeannette P. Bell, Charles E. Porteous, Margaret F. Schmucker, Amelia A. Meury, Jane S. Mathewson and G. Frederic Helbig, respectfully pray for a rehearing of this cause.

Jurisdiction.

The petitioners appealed from a judgment entered in the office of the Clerk of the United States District Court for the Southern District of New York after trial before

a three judge court. On April 3, 1950, this Court granted the motion to affirm the judgment and the judgment was affirmed. This petition is filed within fifteen days thereafter under Rule 33.

Reasons for Petition for Rehearing.

Your petitioners, through inadvertance, did not present a brief in opposition to the motion to affirm and for their inadvertance they respectfully apologize. They respectfully pray that they be permitted at this time to state the reasons why the motion to affirm should have been denied and respectfully ask that this Court reconsider the matter and permit them to present their cause for determination by this Court on the merits.

The appellants challenged the constitutionality of Section 20b of the Interstate Commerce Act, 49 USC 20b, and sued to have annulled and perpetually enjoined an order of the Interstate Commerce Commission dated March 10, 1949, which authorized and approved the extension to January 1, 1972, of bonds of the Macon, Dublin & Savannah Railroad Company, which had become due and payable on January 1, 1947. The District Court dismissed the complaint on the ground that it did not have jurisdiction to consider the cause on the merits because the appellants did not make an application for reconsideration or rehearing of the order of March 10, 1949. The lower court held that the application should also have been made for reconsideration and rehearing of the order of March 10. In its opinion the Court said:

> "And the United States is immune from suit except upon terms laid down by Congress on which it consents to be sued. *United States* v. *Sherwood*, 312 U. S. 584, 586. Since Congress has in explicit terms required a petition for reconsideration to be filed before review in the courts is sought, this court lacks jurisdiction to entertain the present suit."

It was the opinion of the Court that even when the authority of the Commission to make the order is challenged, an application for rehearing or reconstruction is necessary. With respect to that the Court said:

> "The explicit command of Section 17 (9) makes the result inevitable. Congress must have been aware that the constitutionality of various provisions of the Interstate Commerce Act would be challenged in suits to set aside orders of the Commission. The fact that the substantive issue here presented is constitutional cannot remove the barrier to this suit interposed by Section 17 (9). The complaint is dismissed for want of jurisdiction."

The District Court did not lack jurisdiction to hear the cause on the merits. First, it was unnecessary to apply for rehearing or reconsideration of either the order of December 9, 1948, or the order of March 10, 1949, because the appellants challenged, on constitutional grounds, the power of the Commission to make either order. Nevertheless, one of the appellants did apply for the reconsideration of the report and order of December 9, and that application was denied by the whole Commission. If the appellants had applied for reconsideration of the March 10th order the Commission would have been powerless to grant the application because upon making that order the Commission became *functus officio.*

Primarily, the appellants seek to recover upon their bonds which became due and were not paid. Ordinarily they would have brought suit upon their bonds and the Court in that action could have determined the constitutionality of section 20b. Since an adjudication that section 20b is unconstitutional would result in annulment of an order of the Interstate Commerce Commission, the

United States must be made a party and such an action must be brought in the United States Courts. 28 USC 2321; 2322; *Seaboard Air Line Railroad Company* v. *Daniel*, 333 U. S. 118; *United States* v. *Idaho*, 298 U. S. 105; *Skinner & Eddy Corporation* v. *United States*, 249 U. S. 557; *Lambert Coal Co.* v. *Baltimore & O. R. Co.*, 258 U. S. 377.

Macon, Dublin & Savannah Railroad Company was made a party defendant because the action is primarily against it upon the bonds; the United States is made a party defendant pursuant to the mandate of Section 2322 of the Judicial Code and Judiciary act.

It is clear from a reading of Section 17 (9) of the Interstate Commerce Act that its purpose is to afford the Commission or an appellate division an opportunity to correct "any decision, order or requirement of a division, an individual Commissioner or a board with respect to any matter assigned or referred to him or it."

This, however, is not an action to set aside, for error an order of the Interstate Commerce Commission but to *annul* an order of the Commission because it lacked the constitutional power to make it.

Section 1336 of the Judicial Code and Judiciary act (28 USC 1336) expressly vests, in the district courts, jurisdiction in actions "to enforce, enjoin, set aside, *annul* or suspend, in whole or in part any order of the Interstate Commerce Commission." (Emphasis supplied.) And sections 2321 and 2322 (28 USC 2321; 2322) contain consent by the United States to such suits. Suits to *annul* in whole or in part any order of the Interstate Commerce Commission must be brought against the United States; it is an indispensable party.

Section 17 (9) of the Interstate Commerce Act requires an application for rehearing, etc., in suits "to enforce, enjoin, suspend, or set aside orders of the Commission." The word "annul" is omitted from Section 17 (9).

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Clearly Congress intended by the word "annul" which is found in Sections 1336, 2321, and 2322 but not in Section 17 (9) to confer jurisdiction upon the District Courts in actions in which the validity of an order is challenged not for errors or irregularity committed by a board, division or a Commissioner, but for lack of jurisdiction in the Commission to make the order. And an application for rehearng, etc., in such a case is not necessary and is not required by Section 17 (9).

In the instant case the appellants did not anticipate the decision of the Cimmission. Suit was brought after the conclusion of the proceedings before the Commission and after the modification plan had been declared binding upon all bondholders. cf. *Aircraft & D. Equipment Corp.* v. *Hirsch*, 331 U. S. 752.

An application to the Commission for reconsideration of the order of March 10, would have been futile because the Commission could not grant the relief requested, namely, a declaration that Section 20b is unconstitutional and the order therefor void.

In fact, the appellants could not conscientiously make application for reconsideration of the order of March 10th, or of any order of the Commission, because their objection to the order is on constitutional grounds. Rule 101 (d) of the Rules of General Practice of the Commission requires an application for reconsideration to state "the matter claimed to have been erroneously decided and the alleged errors or relief sought must be specified with particularity." The appellants could not make application for reconsideration and comply with the rules laid down by the Commission for such application.

To deny the appellants recourse to the Courts will leave them remediless. They cannot recover upon their bonds until the bar of the order of March 10, 1949, is removed and they are denied the right to sue for the annulment of that order because they did not make application

for its reconsideration on a ground that the Commission could not consider.

Nevertheless, one of the appellants, Helbig, did make application for the reconsideration of the only order which the Commission, under the provisions of section 20b, could reconsider. In its report of December 9, 1948, the Commission, after hearing, made the findings required by section 20b and in its order of the same date authorized the submission of the modification plan to the bondholders for acceptance or rejection. Within the thirty days allowed therefor, Helbig made application for reconsideration of that report and order. And he also asked for a rehearing with leave to submit evidence bearing on the matter and based on information acquired by him after the report was made. That application was denied in its entirety by the whole Commission. Thereafter the modification plan was submitted to the bondholders and accepted by more than the necessary percentage. Section 20b expressly provides that when the necessary percentage have accepted the modification plan "the Commission shall enter an order approving and authorizing the proposed alteration or modification." Apparently that requirement is mandatory upon the Commission and the Commission must in that event make the necessary order. But whether or not the making of that order is mandatory there can be no doubt that having made it, the Commission may no longer reconsider it or set it aside, except possibly for error or fraud in counting or procuring consents. *In re Minneapolis St. P. & SS. M. Ry. Co.*, 50 F. Sup. 748.

Importance of the Questions Involved.

This case presents two questions which are important and which have never been passed upon by this Court.

The first and which the appellants have thus far considered, is the right to sue to annul an order of the Interstate Commerce Commission on the ground that the

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Commission lacked statutory or constitutional power to make it, without an application for reconsideration, etc., under Section 17 (9) of the Interstate Commerce Act. The last case in which this question was considered by this Court is *United States* v. *Idaho*, 298 U. S. 105. And that case was decided before the enactment of Section 17 (9).

The other question is the constitutionality of Section 20b of the Interstate Commerce Act (49 USC 20b. Pub. Laws No. 478, Apr. 9, 1948). That question has never been passed upon by this Court.

It is the thesis of the Government that Congress, in the public interest, under the power granted to it by the Commerce clause of the Constitution may authorize railroad companies to postpone the payment of debts which will become due, and that the giving to a creditor of a promise to pay in the future is the equivalent of payment at maturity. It is their contention that Congress in the exercise of its power may remove and eliminate all evils and burdens and obstructions affecting interstate commerce and that if a railroad company finds a debt which is about to become due or is past due burdensome, then the railroad may say to the creditor "you take my promise of payment in the future in place of the cash which you should receive now".

The constitutional power "to regulate commerce with foreign nations and among the several states" does not vest in Congress the right to postpone the payment of debts which have matured, especially those which had matured before the act authorizing such postponement was enacted. Nor may Congress compel creditors who were entitled to immediate payment to accept a promise of payment in the future.

That power—the power to postpone the maturity date of debts—can be exercised only through the power "to establish uniform laws on the subject of bankruptcies", subject, however, to the rule of "due process". *Louisville Joint Stock Land Bank* v. *Radford*, 295 U. S. 555.

It is a fundamental principle of our jurisprudence that the property of the debtor should be applied to the payment of his debts. To that end, our courts—law and equity—are invested with power to seize and sell the property of an unwilling debtor and to distribute the proceeds to his creditors. The creditors may not demand payment before the debt is due; the debtor may not insist that the creditor extend the due date, either before or after the debt has matured.

This principle of the application of the debtor's property to the satisfaction of his debts is an inherent essential of our bankruptcy law. In the ordinary bankruptcy, the court seizes the assets, sells them and distributes the proceeds among the creditors in order of priority. *Ashton* v. *Cameron County W. I. Dist. No. One,* 298 U. S. 513, 537; *Kushner* v. *Irving Trust Co.,* 299 U. S. 445; 452.

Reorganization, whether under Chapter X or Section 77, is an extension of that principle. It is in effect a liquidation with a theoretical distribution in kind which the recipients pool for the continuance of the enterprise.

Because of the complexity of our economic system and the inability to dispose of gigantic enterprises at fair prices, the industry is continued for the benefit of the participants. The industry has a value only as a going concern and it is only through the continuance of the industry as a going concern that its value may be realized and its creditors paid. There is in fact payment, but the payment is in the only form and manner which is practicable in the circumstances. *Case* v. *Los Angeles Lumber Products Co.,* 308 U. S. 106; *Ecker* v. *Western Pacific R. Corp.,* 318 U. S. 448.

The rule of absolute priority prevails and those in junior positions may not participate until the demands of their seniors have been fully satisfied. The powers of bankruptcy may not be perverted to the benefit of the debtor at the expense of the creditor, nor may it be abused to enable one class to benefit at the expense of another.

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Consolidatd Rock Products Co. v. *Du Bois,* 312 U. S. 510.

Section 20b is distinctly a reorganization statute. *Schwabacher* v. *United States,* 334 U. S. 182. Its primary purpose is to by-pass the Bankruptcy Act. It was specifically designed to enable railroads to avoid the consequences of the bargain which they had made with their creditors. Senate Report 897, 2 U. S. Code Congressional Service 1948, 1450.

Section 20b is not a statute regulating commerce. It is, in fact, an abortive bankruptcy statute enacted under the power granted to Congress to regulate commerce. It was deliberately fashioned to circumvent the principle of the application of the debtor's property to the satisfaction of his debts. It takes rights from the creditor for the benefit of the debtor.

The denial to the creditors of railroad corporations of the right to collect debts which become due, and especially as in the instant case, debts which matured before the law was enacted, amounts in effect to a destruction of the contract and constitutes a taking of property without due process of law in violation of the Fifth Amendment. *Lynch* v. *United States,* 292 U. S. 571; *Holden* v. *Hardy,* 169 U. S. 366; *Louisville Joint Stock Land Bank* v. *Radford,* 295 U. S. 555.

The power to regulate interstate commerce is as much subject to the rule of "due process" as is the bankruptcy power. *North American Co.* v. *Securities & Exch. Com.,* 327 U. S. 686, 704.

Section 20b also violates the Tenth Amendment. Strictly speaking it is not a statute regulating interstate commerce. Rather, its aim is to regulate the relationship existing between railroad corporations and their creditors, but it does not rise to the standard required of a bankruptcy statute. It was expressly enacted to enable railroad corporations to evade and avoid strict performance of their contract obligations and especially to postpone the date of maturity of obligations for the payment of money.

Except to the extent permitted by the bankruptcy clause of the Constitution, Congress may not, directly, legislate on the subject of the relationship of debtor and creditor; that is not a power delegated to the federal government. *Continental Ill. N. B. & T. Co.* v. *C. R. I. & P. R. Co.*, 294 U. S. 648; *Erie R. Co.* v. *Tompkins*, 304 U. S. 64; *Schecter Poultry Co.* v. *United States*, 295 U. S. 495.

The federal government may and has affected the rights of creditors and modified private creditors' contracts through legislation enacted within the scope of the powers delegated to it by the Constitution. All contracts, expressly or impliedly, are made subject to the proper exercise by Congress of its powers. *Continental Co.* v. *United States*, 259 U. S. 156.

Under the power to coin money and regulate the value thereof, Congress may require the creditor to accept payment, not in gold of a certain standard and fineness as provided in the contract, but in legal tender. *Norman* v. *Baltimore & O. R. Co.*, 294 U. S. 240.

Under the interstate commerce clause it may pass the Public Utility Holding Company Act (15 U. S. C., Sec. 79) and in the break-up of a system, compel stockholders to accept the economic equivalent of their stock (*Otis & Co.* v. *Securities and Exchange Commission*, 323 U. S. 624); it may prepay bonds without a premium (*Mass. Mutual Life Ins. Co.* v. *Securities and Exchange Commission*, 151 F. [2d] 424); and it may compel creditors to accept payment partly in cash and partly in stock, or entirely in stock, provided the cash and stock or the stock alone are of sufficient value to fully discharge the obligation. *In Re Standard Gas & Electric Co.*, 151 F. (2d) 326; *In Re Community Gas & Power Co.*, 71 F. Sup. 171, aff'd 168 F. (2d) 740, cert. denied 334 U. S. 846.

A critical study of the cases in which creditors' rights were altered or modified will disclose that in no instance was the debt reduced, the rate of interest modified, or the maturity date extended, except in reorganizations under the

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Bankruptcy Act. And under the Bankruptcy Act there was always enforced the principle of the application of the debtor's assets to its debts.

It must be remembered that in the instant case the complaint is from creditors whose obligations have matured; who are entitled to payment and who have been denied payment and have also been denied the right to apply the debtor's assets to the payment and discharge of their obligations.

If this power to extend the maturity of debts of railroad corporations may be vested in the Interstate Commerce Commission then a similar power might be granted by Congress to the Securities & Exchange Commission over the debts of others engaged in interstate commerce.

In Conclusion.

For the reasons set forth, the appellants respectfully urge that a rehearing be granted; that upon further consideration the judgment of affirmance be vacated and that this cause be placed upon the calendar of this Court for argument.

Respectfully submitted,

JACOB F. HOLMES
JAMES D. BELL,
JEANNETTE P. BEL.
CHARLES E. PORTEOUS
MARGARET F. SCHMUCKER
AMELIA A. MEURY
JANE S. MATHEWSON
G. FREDRIC HELBIG
By DAVID M. PALLEY,
Counsel for Appellants.

I, David M. Palley, counsel for the above named appellants, Jacob F. Holmes, James D. Bell, Jeannette P. Bell, Charles E. Porteous, Margaret F. Schmucker, Amelia A. Meury, Jane S. Mathewson, G. Frederic Helbig, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

DAVID M. PALLEY,
Counsel for Appellants.

APRIL 3, 1950.

Per Curiam Decision.

No. 657. HOLMES ET AL. *v.* UNITED STATES ET AL. Appeal from the United States District Court for the Southern District of New York. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. *David M. Palley* for appellants. *Solicitor General Perlman* and *Daniel W. Knowlton* for the United States and the Interstate Commerce Commission; and *Harold J. Gallagher* and *Mark F. Hughes* for the Macon, Dublin & Savannah Railroad Co., appellees. Reported below: 89 F. Supp. 894.